

**Before the
FEDERAL TRADE COMMISSION
Marketing Practices Division
Washington, DC 20580**

**CAN SPAM Act Notice of Proposed Rulemaking
Project No. R411008
June 27, 2005**

**Comments of
MCI, Inc.
22001 Loudoun County Parkway
Ashburn, VA 20147**

INTRODUCTION

MCI, Inc. ("MCI") hereby submits these comments to assist the Commission in finalizing its proposed rules as allowed by the CAN SPAM Act (the Act). As one of the largest global providers of Internet service, MCI is severely impacted by the rising tide of spam. MCI operates a network abuse center which operates around the clock, 365 days per year in order to address and respond to customer complaints related to spam and other network concerns. As a provider of a broad scope of communications products and services, MCI uses electronic mail to communicate with its customer base and limits all commercial communications to consent based messages.

MCI has a long standing history of empowering consumers to control the amount and content of messages coming into their in-boxes and has been as advocate for laws and policies that accomplish these goals. We believe that every effort must be taken to insure that electronic mail continues to be considered a reliable and efficient communications tool for all who use it for legitimate purposes. MCI applauds the strict criminal sanctions set forth under the Act for fraudulent and deceptive messages, and encourages the Commission to devote greater enforcement efforts on combating illegal practices that are clearly prohibited by the Act. In addition, we hereby provide input on two key sections of the Proposed Rules, as requested by the Commission's publication in the Federal Register on May 12, 2005.

Ten Business Day Opt Out Period

Pursuant to the authority granted to the Commission by the Act¹, the Proposed Rule seeks comment on the time period required for implementing opt-out requests. MCI believes that it is inappropriate to reduce the time period for implementing opt-out requests from ten to three business days.

In its previous comments to the Commission, MCI supported a time period same as that adopted by the Do Not Call rules, which call for a thirty-one calendar day period in order to implement opt out requests. MCI again respectfully submits the need to preserve or extend the time frame allowed for implementing opt out requests.

¹ Section 7704 (c)(1) of the CAN SPAM Act.

Implementation as a Practical Matter. Implementing opt-out requests often does not require deleting an e-mail address, but rather it requires the e-mail address to be added to a suppression list. Then all future commercial messages are “scrubbed” against the suppression list in order to remove messages going to those who have opted out of receiving such messages. Often, global companies have multiple databases against which they must scrub an e-mail address from a recipient who has opted out of receiving commercial communications. Because of differing privacy regimes around the world, it is necessary to keep customer lists separated within various databases, while in many instances, enterprise level customers will be maintained within multiple databases because of their regional and global scope. However, implementing opt-outs in a large global enterprise involves much more than the use of technology for electronic database management.

For example, sales personnel routinely correspond via electronic mail with individuals in their respective account organizations and when an entity is relying on its sales teams to communicate any opt-outs received back to a central data base, this is not accomplished, as a practical matter, immediately or even within minutes. While in theory, each time a customer responds to a sales representative requesting an opt-out, this request can be transmitted to and entered in a database, in the usual course of business, sales representatives often obtain a number of opt-out requests before forwarding a list along, perhaps weekly. This is a reasonable practice and not only complies with the Act, it is in conformance with what average consumers deem to be a reasonable length of time. At MCI, because our electronic marketing practices are consent based and commercial messages are not generally sent out on a daily basis to the same list of

customers, it is unlikely that any messages are sent to the same recipient from the same business unit more than once in a ten day period.

In addition, customers do not always avail themselves of the opt out link inserted into commercial messages. They sometimes hit the “reply button” or contact the billing call center to voice their request to be removed from the message lists. As a company working hard to address the needs of its customers, we willingly comply with our customers requests not to receive messages, regardless of the manner in which the request is communicated to the company. However, as a result, there is a certain amount of lag time from the point the request is received to the time it is entered into central databases managing our electronic communications.

Three days does not take into consideration the “human factor” involved when customers avail themselves of alternate means of opting out or professionals with multiple priorities and deadlines are tasked with forwarding individual requests. These common practices allow MCI to better serve its customers’ privacy and communications preferences, but will be difficult to continue should the implementation period be reduced to three (3) days.

Third Party Partnerships. A widely used practice in global marketing is the use of third party vendors for the resale and distribution of products and services. If a third party vendor or reseller is assigned with the task of sending commercial messages on behalf of a company, both the vendor and the company can do a better job complying with recipients’ opt-out requests if they are given adequate time to do so, and three days is not sufficient for the communication and implementation between multiple company databases.

Another common practice involves partnerships among large entities to co-brand programs which would provide added benefits to consumers who become customers of both companies. In marketing such programs, both companies could be considered the Sender for purposes of the Act under the Commission's Proposed Rule. However, this would also require additional time and coordination beyond what each company's automated database management tools allow.

The Proposed Rule makes much of the lack of specific data supporting longer time frames for implementation. However, in complex marketing transactions where multiple marketing initiatives among various third party entities and outside partners must be communicated through one team and be entered into a single database, it is not hard to understand why three days is not sufficient. When personnel implementing such opt outs is reduced due to illness, vacation or other business priorities, it becomes all the more difficult for entities trying to comply with the Act to complete requests within three days.

As noted in the Proposed Rule, a key policy objective of the Act is to afford optimal privacy *given reasonable compliance costs* (emphasis added). By reducing the Act's recommended time period by more than half, the Commission is forcing a lofty price tag on entities which are currently, and wish to remain, in compliance with the Act. As illustrated above, it could also limit the ability of consumers to communicate their privacy needs and reduce the level of service obtained from their service providers.

Enforcement. The Proposed Rule uses improved enforceability as a basis for reducing the time period for opt-outs. The Proposed Rule indicates that a shortened opt

out period would further the enforcement goals of the Act by not necessitating proof of a defendant's state of mind when seeking orders or injunctive relief.

This rationale can only be based on the belief that opt out implementation is the only aspect of the Act that is generally violated. MCI's experience indicates that this is not the case. In fact, MCI submits that opt out implementation may not even be the most common method by which the Act is routinely violated. A small sampling of spam complaints forwarded to MCI's network abuse team indicates that emails which are not in compliance of the Act generally violate the requirements in several ways, many of which can be used to seek enforcement relief without having to prove a defendant's state of mind. MCI's review of spam complaints established the following findings:

- Fifty-nine percent did not provide any mechanism for opting out of receiving future emails.
- Sixty-three percent did not provide a physical postal address.
- Fifty-six percent falsified header, footer or other retransmission information.²
- Twelve percent failed to include a subject heading notice that the email contained sexually oriented material where appropriate to do so.
- Sixty-three percent of the sample reviewed indicated at least one violation without further proof of the sender's state of mind.
- Fifty-nine percent of the total sampled was in violation of two or more provisions of the Act not requiring further proof of the sender's state of mind.

² This was the percentage of complaints which plainly showed that such information was falsified, without further analysis. It is the experience of MCI's network systems personnel that there is a very high likelihood that this number would actually be much higher if a full investigation is launched to trace the path of all complaints in the sample.

Thus, actual numbers of spam do not bear out the need for a reduced opt out period in order to seek timely enforcement tools against alleged spammers.

Expiration of Opt Out Requests

The Proposed Rule does not include a term at which opt out requests will expire based on lack of specific direction by Congress to do so. MCI strongly urges the Commission to adopt a reasonable term at which email addresses can be purged. The Commission has authority to impose a term based on the Congressional intent that the FTC impose rules to implement the Act. Setting a term limit for which email addresses remain in opt out data bases falls squarely within the Commission's authority. As noted in the Proposed Rule, there are a variety of reasons for setting a limit on the time period for opt outs. Consumers change the email addresses they use; addresses can become inactive from non-use or overflow activity; and accounts closed by one individual may eventually be used by a different individual who would like to receive commercial electronic communications.

It does not make sense to keep addresses in a database in perpetuity without any notion as to whether they may continue to belong there or not. Doing so does not enhance consumer privacy; it does not advance the goals of the Act; and it does not promote more effective enforcement of the Act. As noted above the entities that are currently in violation of the Act seem to be in complete ignorance and/or avoidance of its

legal requirements. It is most likely that such entities will remain in violation of the Act without any consideration to an expiration date, if one were to be in place.

On the other hand, the most impact of not allowing for expiration of opt out terms will be felt by organizations that are, and continue to work hard to remain, in compliance of the Act. These entities will bear an unwarranted cost for storing addresses in perpetuity with very little, if any, added benefit to consumers and law enforcement agencies. In addition, there is a very real marketing opportunity that will be lost without a term limit. As companies increase their product set, provide expanded services and/or expand their business offerings, it is reasonable to expect a substantial portion of customers to want to receive electronic messages informing them of such services or opportunities.

Accordingly, some specific term of three to five years would be a reasonable limitation on the opt out requirements of the Act. For legitimate entities, it would take very little effort for a consumer to remain on an opt-out list, and for those entities which will fail to honor opt out requests, the lack of an expiration term will provide no added protection to consumers. Thus, MCI requests that the Commission act in its authority to impose a term limit of three to five years on the period an opt-out request remains in effect.

Conclusion

In furtherance of the privacy, practicality and enforcement concerns outlined above, MCI submits the foregoing comments for consideration by the Commission in its Proposed Rule.

Respectfully submitted,

Magnolia Mansourkia, Esq.
Director
Law and Public Policy
MCI, Inc.